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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 561

KENNETH L. HOSTETLER, EARL ALBERTSON, JUNIOR A. AVERS, WALLACE L. AVERS, HUBERT BALL, JOSEPH B. BLACKER, MARVIN D. CLEM, MILTON RICHARD COCHRAN, THOMAS P. COUNIHAN, CURTIS V. DEVELBISS, MAHLON A. LEATHERMAN, DANIEL R. NOBLE, HARLEY M. SAVILLE, GEORGE A. STAFFORD, GEORGE E. THOMAS AND RAYMOND F. ZEGLES, *Petitioners*,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, *Respondents*.

JAMES F. DECKER, GEORGE D. BEAL, JOHN D. CLARK, GEORGE H. R. DAVIS, LOUIS R. DAVIS, MICHAEL D. GLEASON, ARCHIE LEWIS, HARRY L. NINES, RAY C. RESH, WILLIAM R. SAMPSELL, FRANK L. G. T. SMITH, FRANK A. TROZZO AND JACK W. WHITTINGTON, *Petitioners*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kenneth L. Hostetler, et al., and James F. Decker, et al., (including all of the twenty-nine appellants named above)

pray that a writ of certiorari issue to review the judgment entered in this cause on September 21, 1961, by the United States Court of Appeals for the Fourth Circuit.

(a) OPINIONS BELOW

The majority opinion of the United States Court of Appeals and the opinion of Judge Bryan, concurring in part and dissenting in part, are officially reported in 287 F. 2d at pp. 457 and 461, respectively, and are reprinted herein. The Court's opinion on motion for rehearing is likewise reprinted herein but has not yet been officially reported. The opinion of the United States District Court and its Order modifying said opinion are printed at pp. 96 and 120, respectively, of Appellants' Appendix in the Court of Appeals, copies of which are furnished with this Petition. The opinion itself is reported in 183 F. Supp. 281, but the Order of Modification is unreported. The Court's subsequent Memorandum (filed after the case had been appealed to the Court of Appeals) is printed at p. 121 of Appellants' Appendix but is unreported.

(b) JURISDICTION

The judgment of the United States Court of Appeals, which is here sought to be reviewed, was originally entered on February 23, 1961. Motion for rehearing was seasonably filed and was denied on September 21, 1961. The Order denying rehearing, constituting the final judgment of the United States Court of Appeals, was dated and entered on September 21, 1961. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254(1).

(c) QUESTIONS PRESENTED FOR REVIEW

The questions in this litigation relate to (1) the duty of a union bargaining representative to refrain from discrimination in enforcing a union shop agreement, and its similar duty to enforce such agreement only for the legitimate purpose of compelling payment of dues and not for extraneous reasons and motives such as the punishment of employees who joined a rival union; (2) the propriety of action by a Court of Appeals in weighing evidence as to disputed facts bearing on discrimination and making findings thereon, rendering a final decision on motion for summary judgment instead of permitting a plenary trial by jury on such factual issues; (3) whether, in view of proof of malicious motivation on the part of the bargaining representative, it should be required to consent to the Railroad's voluntary reemployment of the discharged employees with full seniority, and (4) questions relating to applicability of *International Assn. of Machinists v. Street*, 367 U.S. 740 (these Appellants having filed a brief as *amicus curiae* therein).

The exact questions before the Court can be stated only in terms of the particular factual situation, in the framework of the history of the case.

As presented to the courts, this litigation concerning the administration of a union shop agreement under the Railway Labor Act is wholly between the discharged employees and the union. The Railroad is not a party and has agreed with the employees to reinstate them *with full seniority* if the defendant Brotherhood will permit. (Under the Act they are admittedly entitled at least to be employed as new workmen, without seniority, but the denial of seniority results in depriving them of their

of livelihood, as shown in Judge Bryan's opinion, *infra*, at pp. 25, 28-30.)

The action began as one for damages for wrongfully causing Appellants' discharge. Appellants further sought, by amendment, alternative equitable relief in the form of an order compelling the Brotherhood to consent to their reinstatement with seniority.

The first, or basic, legal question is:

I.

Is a Union bargaining representative's duty under the Railway Labor Act to represent all employees fairly and without hostile discrimination in the administration of a Union Shop Agreement, and to invoke discharge procedures for no purpose except to compel payment of dues, violated by hasty and discriminatory prosecutions of certain employees under the Union Shop Agreement which are motivated by a grudge against them due to activity in aiding a rival Union?

The District Court granted summary judgment for the Brotherhood, holding that its motives in acting within its contractual and statutory rights to compel plaintiffs' discharge were immaterial. See Applts. App., pp. 103-104; 183 F. Supp. at p. 287.

The majority of the Court of Appeals, "assuming that the discrimination in both citation and reinstatement alleged in the pleadings would constitute a cause of action", nevertheless affirmed the summary judgment against Appellants. It purported to review the incomplete record *as presented for purposes of summary judgment*, and found that the charge of unlawful discrimination was not established. In so doing, it weighed certain evidence and inferences

therefrom as trier of fact instead of considering whether there were disputed issues of fact to be determined on a plenary trial; and it ignored the clear written evidence as to the Brotherhood's malicious motivation, summarized in Judge Bryan's separate opinion (287 F. 2d at pp. 462-3). Thus, the majority opinion appears to represent a decision on the facts depriving Appellants of their right to a jury trial on disputed facts. Indeed, the Reporter's Headnote No. 4, 287 F. 2d 457, states:

> "Evidence sustained finding that railroad union citing plaintiffs to railroad after their failure to pay dues, did not unlawfully discriminate against plaintiffs".

Considering Appellants' request for equitable relief, the Court of Appeals found that they had in good faith sought to comply with the union shop agreement by joining another union deemed to be qualified, and concluded that it would be "disposed under these circumstances to order the Union to permit reinstatement with seniority" but for the decision in *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, which, it held, precluded such relief.

Judge Bryan's dissenting opinion states and considers the clear evidence of the union's improper motives in seeking to compel Appellants' discharge, evidence which was not mentioned in the majority opinion. He distinguished the *Rychlik* case as involving the liability of the Railroad, as to which equities existing between the union and the employees would be immaterial. Accordingly, he held that Appellants were entitled to a plenary trial on the merits of their equitable claim.

The turn which the case has taken in the Court of Appeals therefore presents these questions:

II.

Where there are material facts in dispute as to the Brotherhood's discrimination against Appellants in administration of its Union Shop Agreement, and as to its motives in invoking the agreement against them, were Appellants deprived of their right to a jury trial by the granting of motions for summary judgment without a trial on the merits?

III.

Where the Brotherhood was motivated by a grudge against Appellants, for their rival union activity, in its prosecution of them under the Union Shop Agreement, and Appellants had in good faith sought to comply with the agreement by alternate union membership, are they entitled to relief in equity through an order compelling the Brotherhood to consent to their reinstatement with seniority in their employment, as agreed by the Railroad?

This Court may, further, wish to review the question discussed in the opinions in the Court of Appeals as to whether Appellants are entitled to relief similar to the relief accorded plaintiffs in *International Association of Machinists v. Street*, 367 U.S. 740. This question may be stated as follows:

IV.

Where Appellants complained of misapplication of union dues funds to political purposes, by amending their pleadings as soon as they learned thereof (as in Street), are they entitled to relief similar to that accorded the Street Plaintiffs?

(d) STATUTES INVOLVED

The Jurisdiction of the District Court

U.S. Code, tit. 28, sec. 1337, provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies".

General

The particular "Act of Congress regulating commerce" under which the action arises is the Railway Labor Act, especially U.S. Code, tit. 45, Sec. 152, Eleventh, the so-called "union shop amendment" which was adopted in 1951. This section is voluminous and is therefore printed in Appendix A to this Petition.

The basis for federal jurisdiction is further discussed *infra* in "Statement of the Case".

(e) STATEMENT OF THE CASE

The facts are largely summarized in the majority and separate opinions of the Court of Appeals (see Appendix B) and certain salient facts have been referred to heretofore (see "Questions Presented for Review").

Because of the factual basis adopted by the Court of Appeals for its decision, it will be convenient to refer to additional portions of the Record bearing on the motives of the Brotherhood and its discrimination against Appellants, as appearing in their Appendix.

As to Motives of BRT

As stated by Judge Bryan, "the bitterly vengeful attitude of the Brotherhood is manifested by its conduct towards the trainmen. On September 3, 1953, within three months after the last withdrawals by the plaintiffs from

BRT, the General Chairman of its Grievance Committee rejected an application for reinstatement to the union of a former member because the applicant had joined UROC. This rejection was publicized to all of the plaintiffs as notice of the union's intentions toward them." Judge Bryan then summarizes the letter, which appears in full at Applts. App. 52-54.

The attitude of BRT toward the Appellants is further shown by its actions in (1) refusing to approve informal curative procedures as to back dues which had hitherto been permitted and still were permitted to others (Applts. App. 76, 78-79, 61); (2) insisting that appellants were no longer members, although they had not resigned, and that formal applications for membership would be required of them if they desired to pay up their back dues although not of others (pp. 92-93); (3) refusing to furnish such application forms on request (pp. 75, 78, 88-89, 92-93); (4) ignoring forms which were sent in (p. 85), and (5) hastily invoking inforcement procedures against Appellants and refusing to consider for reinstatement those who had been cited (pp. 64, 89; also summary by Court p. 62).

As to additional matters bearing on motives of the BRT, see pp. 58, 63, 69, 78.

Discrimination

Hasty expulsion and citation of many of the plaintiffs is shown in the Tables and Charts (pp. 35, 37, 41*), at least thirteen being "expelled" from the BRT the day following the last date to which dues were paid, and "cited" to the Railroad within two to eight weeks thereafter. In contrast, the practice and policy of the BRT had always been to allow up to many months' grace in payment of dues, according to testimony at administrative hearings given

* Dates of expulsion shown at pp. 43-47.

by a number of the plaintiffs (pp. 73-74, 76, 78-79, 81-83, 86, 89-90). The Brotherhood's General Chairman on the B. & O. did not deny that this policy of leniency existed (p. 77).

See also instances of discrimination noted in the preceding paragraph.

Basis for Federal Jurisdiction

The District Court had jurisdiction of the action in the first instance as it arose under the Railway Labor Act, particularly U.S. Code, Title 45, Sec. 152 Eleventh, asserting breach by the Defendant Brotherhood of its fiduciary obligations as bargaining representative owed to Appellants as employees. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood*, 323 U.S. 210; *Ford Motor Company v. Huffman*, 345 U.S. 330; *Conley v. Gibson*, 355 U.S. 41. The question of jurisdiction is discussed in the District Court's opinion (Applts. App. 100) and in the opinion of the Court of Appeals (this App. p. 21) and decided in favor of the Appellants by both courts.

REASONS FOR GRANTING THE WRIT

1. Decision Contrary to Views Prevailing in Four Other Circuits.

The decision that the conduct of the union, notwithstanding the evidence of hostile motivation and discrimination, did not violate its fiduciary obligations appears to place the Court of Appeals squarely in opposition to decisions of the Courts of Appeals of the Second, Fifth, Sixth and Ninth Circuits.

Second Circuit—

N.L.R.B. v. Biscuit & Cracker Workers Union (1955), 222 F. 2d 573;

International Ass'n. of Machinists v. N.L.R.B. (1957), 247 F. 2d 414;
Cunningham v. Erie R. Co. (1959), 266 F. 2d 411.

Fifth Circuit—

N.L.R.B. v. Pape Broadcasting Co. (1954), 217 F. 2d 197.

Sixth Circuit—

J. A. Utley Co. v. N.L.R.B. (1954), 217 F. 2d 885.

Ninth Circuit—

N.L.R.B. v. Technicolor Corp. (1957), 248 F. 2d 348.

In all of these cases, substantial discrimination or hostile motivation in the invocation of union security contract provisions was alleged or shown, and in each instance the court held that these facts, if found, would justify relief against the union bargaining representative and, in some instances, against the employer if it participated with knowledge of the union's discrimination. In each of the cases the court found or assumed for purposes of its reasoning that there had been a default in payment of dues but specifically held that this did not excuse discriminatory enforcement.

In *International Assn. of Machinists v. N.L.R.B.*, *supra*, the Court of the Second Circuit sent a case to trial on the merits to ascertain whether union demands for discharge under a union shop agreement "were based, even in part, upon some grounds other than non-payment of dues", such as "union pique" over the employee's actions. Similarly, in *N.L.R.B. v. Biscuit & Cracker Workers*, *supra*, the Court allowed relief to the employee upon concluding that "the facts of this case leave no doubt that the union caused Borg's discharge not for his failure to pay union dues —

though concededly his dues were in arrears — but solely because of his outburst in the union office." The same Court, in *Cunningham v. Erie R. Co., supra*, sent a Railway Labor Act case to trial to determine whether the union had failed in its duty "to forbear from hostile discrimination" in prosecuting the plaintiff under the union shop agreement.

The *Pape Broadcasting Company* case, *J. A. Utley Co. v. N.L.R.B.*, and *N.L.R.B. v. Technicolor Corp., supra*, are decisions in the Fifth, Sixth and Ninth Circuits, respectively, similar to the decisions in the *Machinists* and *Biscuit Workers* cases.

2. Decision in Conflict with Applicable Decisions of Supreme Court.

The decision that no relief can be granted to the Appellants, notwithstanding the hostile motivation of the union in prosecuting them, appears to decide a federal question in conflict with applicable decisions of this Court.

Radio Officers Union A.F.L. v. N.L.R.B., 347 U.S. 17;
Steele v. Louisville & N.R. Co., 323 U.S. 192;
Conley v. Gibson, 355 U.S. 41.

The above line of cases is undoubtedly familiar to the Court and requires no detailed discussion. In *Radio Officers Union* this Court said, in discussing the union shop provisions of the Labor Relations Act, as amended in 1947 by the Taft-Hartley Act, the "legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." This would seem clearly to call for an inquiry into the motives of the bargaining

representative where there is evidence, as here, of extreme hostility toward the employees against whom the agreement is invoked.

3. Misapplication of Supreme Court Decision in Rychlik Case.

The denial of relief in equity, which the Court of Appeals says it would otherwise be disposed to grant, is based solely on the majority's erroneous conception that *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, precludes such relief.

Cf. the majority opinion's analysis of that case (App. 23) with Judge Bryan's analysis (App. 31).

In the entire *Rychlik* litigation (two reported opinions of the District Court, one of the Court of Appeals and two in this Court) there is no indication whatever of any contention that *Rychlik* was the victim of discrimination or of malicious motivation on the part of the union. The entire claim was grounded on the supposed position of "UROC" as a qualified union "national in scope", to which the employee could belong and thereby maintain alternative union membership protecting his employment. The Court of Appeals, assuming the status of U.R.O.C. to be a factual question, concluded that it was improper for a final decision to be rendered against Rychlik by a system board of adjustment, one-half of whose members represented the Brotherhood. When this Court determined that U.R.O.C. was not qualified, as a matter of law, the whole basis of the litigation collapsed.

Moreover, the *Rychlik* case was a suit to require *both the Railroad and the Brotherhood* to reinstate the employee. To that extent it was a dispute between an employee and a carrier, of which an administrative board would have primary jurisdiction. Not so in this case, for

here the Railroad has consented to reinstate Appellants and only the Brotherhood need be placed under compulsion; it is the sole party with whom Appellants have a dispute.

Judge Knight's decision in the District Court in *Rychlik* held that there was no sufficient ground alleged for intervention by a court of equity (128 F. Supp. at pp. 454-55). In this Court, Mr. Justice Frankfurter's concurring opinion, while it does not accept the view that U.R.O.C. was unqualified as a matter of law, nevertheless concludes that the District Court lacked jurisdiction to grant relief because there was no allegation of arbitrary or inequitable conduct, and the case was therefore not brought within the principle of *Steele v. Louisville & N.R. Co., supra.*

He refers to the *Steele* case as stating a "counter-principle to be respected." (352 U.S. at p. 430).

In the instant case the "counter-principle" is invoked by apt allegations and proffered proof. The hostile and arbitrary conduct of BRT in prosecuting Appellants is the foundation of their claim for relief, and *Rychlik*, which does not deal with that problem, is patently inapplicable.

4. Decision Rendered on Summary Judgment in Conflict with Supreme Court Decisions as to Right of Jury Trial.

In deciding to deny Appellants a plenary trial on the issues of malice and discrimination, notwithstanding the evidence presented on summary judgment, and in evaluating the evidence, accepting the Brotherhood's explanation of its reasons for discriminating, and ignoring the facts tending to show express malice, the Court of Appeals has decided a controlling procedural question in a way in conflict with numerous decisions and statements of this Court and with the whole course of American decisions protecting the right to jury trial of disputed facts.

See, e.g., *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, at p. 35.

The principle is clear and unquestioned; its application depends upon review of the Record available to the trial court on Defendants' Motion for Summary Judgment. In the separate opinion of Judge Bryan and in earlier portions of this Petition some of the evidence, which at least placed the questions of malice and discrimination in dispute, has been summarized or referred to. Upon consideration of the Record, it is confidently predicted that this Court will find a clear disregard of the right of Appellants to have a jury trial upon the disputed material questions of fact in the case, as bearing upon their action for damages against the Brotherhood for the wrongs they have suffered.

CONCLUSION

In this day when powerful economic units, representing large aggregations of capital or labor, are given broad scope to regulate conditions in industry, it is of paramount importance that the courts should protect the rights of individuals against arbitrary abuses of these powers. Particularly in the invocation of union security agreements for an unworthy purpose, to punish those individuals who have dared to disagree, powerful and irresponsible labor leaders may need the corrective and restraining hand of the courts.

The present case involves not only the livelihood of the forty or more plaintiffs and their families, destroyed by hostile union leaders to satisfy a grudge; it involves also a principle of restraint applicable to all those in fiduciary positions in the labor field which requires enunciation and restatement by this Court as a charter of the minimum rights of the individual workingman, — one who in good

faith supports collective bargaining but does not submit to all the regimentation of thought and action desired by some of the more powerful labor groups.

In this sense, the case assumes a broad public importance which transcends the substantial individual rights sought to be protected by the review herein requested.

Respectfully submitted,

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APPENDIX A

U. S. CODE, TIT. 45, SEC. 152 ELEVENTH

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, *that within sixty days following* the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of employees, of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: PROVIDED, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees,

and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: PROVIDED, However, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: PROVIDED, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

APPENDIX B

OPINIONS OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8185.

Kenneth L. Hostetler, Earl Albertson, Junior A. Avers, Wallace L. Avers, Hubert Ball, Joseph B. Blacker, Marvin D. Clem, et al.,

Appellants,

versus

Brotherhood of Railroad Trainmen, an unincorporated association, and General Grievance Committee, Brotherhood of Railroad Trainmen, Baltimore & Ohio System,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued November 8, 1960. Decided February 23, 1961.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and BRYAN, District Judge.

Herbert M. Brune (Meyer Fix on brief) for Appellants, and Bernard M. Savage (Wayland K. Sullivan on brief) for Appellees.

PER CURIAM:

For many years the appellants had been employees of the Baltimore and Ohio Railroad Company and members of the Brotherhood of Railroad Trainmen (BRT). In September, 1951, the B. & O. and BRT entered into a union shop agreement, pursuant to the Railway Labor Act,[1] requiring

[1] 45 U.S.C.A. section 152, Eleventh (a) and (c).

employees in the crafts represented by BRT to become, as a condition of continued employment, members of that or of another union national in scope and organized in accordance with the Act. At various times in the fall of 1952 these appellants stopped paying dues to the Brotherhood and joined a newly formed labor organization, known as the Union of Railroad Operating Crafts (UROC). This union was later held by the Supreme Court not to be "national in scope" and not "organized in accordance with the Act," as it had never qualified under Section 3, First of the statute.[2] *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1957). Thus, the Supreme Court decided that membership in UROC was not compliance with the maintenance of union membership provision of the union shop agreement. Of course, this infirmity in the status of UROC was not known to the appellants when they withdrew from BRT and joined UROC in 1952. They believed that UROC membership was compliance with the union contract, and it was not finally determined until five years later that this belief was erroneous.

Shortly after they joined UROC and stopped paying dues to BRT, the appellants were cited to the Railroad by the Brotherhood for violation of the union shop agreement. They received initial hearings before a B. & O. hearing officer and later appeal hearings before another railroad hearing officer. After adverse decisions in these proceedings, they were finally discharged by the B. & O. in 1957.

The present action was then commenced in the District Court by the appellants against the Brotherhood to recover damages resulting from their discharge. The Railroad, although initially brought into the case by BRT, is no longer a party, as it has agreed to reinstate the appellants if the Brotherhood will withdraw its objections. The complaints alleged that the appellants were victims of various discriminatory practices by BRT in that (1) the Brotherhood cited them to the B. & O. for discharge while not citing others who were delinquent in dues payments, (2) that the Brotherhood hastily cited them while delaying considerably

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[2] 45 U.S.C.A. section 153, First.

before citing others, and (3) that BRT discriminated against them in refusing to reinstate them with full seniority.

The complaints also alleged that the defendant union had been unlawfully using dues for political purposes and, because of this, must be forbidden to invoke the union shop provisions against the plaintiffs.

After testimony had been taken, the appellants filed a motion to amend their complaints, and attached the proposed amendment, seeking an order compelling BRT to withdraw its objections to their reinstatement with full seniority as employees of the Railroad. The District Court, after the plaintiffs had presented whatever evidence they desired relative to these allegations, granted the defendant's motions for summary judgment and denied the plaintiffs' motion for leave to amend their complaints asking for reinstatement. The District Judge wrote an extended opinion, discussing the facts of the case in more detail, which is reported at 183 F. Supp. 281.

It is well established that, under both the Railway Labor Act and the National Labor Relations Act, a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Conley v. Gibson*, 355 U.S. 41 (1957). On this appeal, the appellants do not press, as they apparently did not in arguments before the District Court,[3] the issue of discrimination in reinstatement as BRT members, but they rely upon discrimination allegedly practiced in the citation of some dues defaulters while excusing others, and in the speedier citation of some than of others.

First, we do not think it unlawful, under the doctrine of the above cases, for the Brotherhood to cite some employees to the Railroad for failure to maintain membership

[3] See 183 F. Supp. at page 287.

in a qualified union more promptly after their default than it cites others. BRT's reason for this was that, as to some, it had greater hopes of persuading them to rejoin. This would seem to furnish a reasonable basis for distinctions in treatment and not to constitute the arbitrary discrimination forbidden by the law.

Assuming that the discrimination in both citation and reinstatement alleged in the pleadings would constitute a cause of action, we have carefully reviewed the record and find that, when given the opportunity by the District Court, the appellants were unable to present any significant evidence of discriminatory treatment.[4] In view of the fact that

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[4] In that court the plaintiffs submitted names of men whom BRT allegedly treated more leniently than the plaintiffs. However, BRT, in affidavits uncontested by the plaintiffs, disclosed persuasive explanations negating discrimination in these cases. This material may be briefly summarized. With respect to those whom BRT reinstated after they stopped paying dues, most of them were reinstated by locals of the Brotherhood in other states which observed a milder policy than the Maryland locals. In the remaining instances, some sought reinstatement prior to the initial hearings before the B. & O. officer, and, according to BRT, if the plaintiffs had asked for reinstatement and tendered their back dues at any time before their initial hearings, they also would have been granted reinstatement. None of the plaintiffs sought reinstatement until after their initial hearings. In the case of others, there were special circumstances justifying the union in making exceptions and restoring them without loss of seniority rights. In the cases of those as to whom it was alleged that they failed to pay dues but were not cited at all, it was shown that they actually were cited, or they had resigned from their employment, or they in fact had not defaulted in dues payments, or there were unusual circumstances warranting special consideration.

The only other evidence submitted to the District Court to support the allegations of discriminatory treatment consisted of the testimony of several of the plaintiffs. Superficially, this testimony might seem to bolster the charge of discrimination in reinstatement, for the plaintiffs testified that the door was closed against their rejoining BRT whereas it was open to others less active than they in UROC. When questioned, however, the plaintiffs were unable to present any evidence tending to show that the Brotherhood failed to apply uniformly the stated policy to allow defaulters to renew their membership up to the time of their initial hearings. As previously mentioned, these appellants did not seek to rejoin the Brotherhood until their appeal hearings.

the appellants, when afforded the opportunity, could offer no substantial evidence of unlawful discrimination, a further trial on the issue would be unwarranted. Upon the showing made, the District Court was not in error in resolving this point against the plaintiffs.

With the issue of discrimination eliminated, we are brought to the appellants' contention that the union shop agreement could not properly be used against them to effectuate their discharge in 1957 because of BRT's alleged use of union dues for political purposes. For that contention to prevail, it would be necessary to hold that such use of dues automatically terminates the Brotherhood's right under the Railway Labor Act to enter into or maintain a union shop agreement.[5] If it be assumed that, the use of dues for political purposes by a union having a union shop agreement, either infringes the constitutional rights of objecting members or violates the Corrupt Practices Act,[6] the invalidation of the union shop agreement does not necessarily follow. There could be less drastic relief than an adjudication of unconstitutionality of the Railway Labor Act as applied here. A milder, and sufficiently effective, form of relief would be to enjoin such misuse of dues. Since we think a remedy other than voiding the union shop would be more appropriate, the plaintiffs could not have the relief they ask in this case even if they established that dues were used for political contributions.

Finally, the District Court did not err in denying leave to file the amendment to the complaint which sought to compel BRT to allow them reinstatement in their employment with full seniority. In the absence of discriminatory treatment by the Union, *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1952), appears to preclude such relief. The present plaintiffs prayed for an order requiring BRT "specifically to withdraw its objections to the reinstatement of plaintiffs in their employment with the Baltimore and

[5] This question is now before the Supreme Court. *International Association of Machinists v. Street*, probable jurisdiction noted, 361 U.S. 807, and recently argued.

[6] 18 U.S.C.A. section 610.

Ohio Railroad Company." This is precisely the relief the plaintiff sought in the *Rychlik* case: "Rychlik, on behalf of himself and other employees of the Railroad similarly situated, thereupon brought this class suit in the United States District Court for the Western District of New York, *seeking an injunction compelling petitioners to accept him as* a member of the Brotherhood and *an employee of the Railroad.*" (Emphasis supplied.) 352 U.S. at page 483. The Supreme Court denied his plea and held that the complaint should be dismissed. To afford the plaintiffs the relief prayed in their proposed amended complaint would be to completely excuse their failure to maintain continuous union membership in a qualified union. Although the equities strongly favor excusing them, as they certainly intended to abide by the union shop agreement and their only default was an understandable inability to predict a Supreme Court decision, we are powerless to grant them the desired relief if we are to be obedient to the *Rychlik* doctrine.

These men would seem to be entitled under the statute only to reemployment as new men, with such seniority rights as are due new employees having their skills and experience, under the Railroad's employment practices and the collective bargaining agreement. The defendant, in its answer to the plaintiffs' motion for leave to amend, agreed that the plaintiffs had the right to be hired as new employees. Thus, the only relief, consistent with *Rychlik*, that could be given under the proposed amended complaint is not contested by the defendant union.[7]

It is unfortunate that these appellants, who always belonged to a union, and who in good faith intended to comply with the union shop agreement, should be restricted to reemployment as new men, with the loss of seniority rights

[7] In fact, apparently the appellants have joined other qualified unions and become entitled as of the date of such membership to seek employment from the Railroad. Reinstatement in BRT would not enlarge plaintiffs' rights over their rights as members of other qualified unions.

earned by faithful service to the Railroad for many years, only because the union to which they belonged for a short period was subsequently held not qualified under the statute. If *Rychlik* did not stand in the way, we should be disposed under these circumstances to order the Union to permit reinstatement with seniority. However, these same equities were present and acknowledged by the Supreme Court in the *Rychlik* case, but it was there held that no federal cause of action existed.

For the above reasons, the decision of the District Court must be

Affirmed.

BRYAN, District Judge, concurring in part and dissenting in part:

The livelihood of the appellant trainmen is, by the opinion of the Court, left subject in a serious degree to the pique of the appellee union. The union shop agreement and the 1951 amendment of the Railway Labor Act are allowed to be the instruments of the subjugation. Solely because the appellants left the union and joined another, the former as their collective bargaining representative has, in retaliation, stripped them of their seniority earned over many years with the Baltimore & Ohio Railroad. This is the gravest of the grievances pleaded by the trainmen. The Court gives them no relief. To this I cannot assent.

I dissent, too, from the affirmance of the denial of a trial to the trainmen in their attack on the validity of the union shop agreement, based on the alleged use of union dues for political purposes. But I concur with the Court in holding that the trainmen made no case for damages for discrimination, initially, in their expulsion from the union and in their original citation to the Railroad as no longer maintaining union membership within the meaning of the agreement. Clarity and the chronology of the pleadings require these three aspects of the suit to be discussed in inverse order to this enumeration of them.

I. The District Court found in the record an unusual haste and promptness by the Brotherhood of Railroad Trainmen in expelling and citing the appellants, but it was of the opinion that this differentiation did not amount to actionable discrimination. I hold this view, too, because the plaintiffs purposefully left BRT and intended to end their membership. The union merely took them at their word, which was hardly a discrimination. For the same reason the Brotherhood was warranted in swiftly citing them to the Railroad and questioning their eligibility for continued employment.

II. The cause of action pitched on the statutory and Constitutional invalidity of the union shop agreement was thought by the District Judge to be beyond his jurisdiction. He noticed the want of diversity of citizenship between the parties; he also concluded it was not a controversy arising under the laws of the United States. But, even if these holdings are sound, there is another basis for jurisdiction. It is that the asserted claim is so intimately related to the other issues, concededly within the competence of the Court, that it should be adjudicated in this cause despite any deficiency in explicit Federal jurisdictional attributes.

The union shop agreement was the very foundation and justification of the citation by BRT. Consequently, the trainmen's claim assailing that contract was a related and inseparable controversy. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909); Hurn v. Oursler, 289 U.S. 238, 242 ff. (1933); Strachman v. Palmer, 177 F. 2d 427 (1 Cir. 1949), 12 ALR 2d 687, with note at 695.

On the worth of the claim, the trial court scrupulously recounted the assertions of the trainmen that BRT from 1928 to 1937 was, and again since January 1, 1956 has continuously been, affiliated with the Railway Labor Executives Association; and that during 1956 and 1957 some of the general funds, including dues received, of BRT were funneled through the Association to the Railway Labor Political League for application to political purposes. The District Judge noted that no dues, therefore, were so ap-

plied in the years 1951-1955, when the union was not associated with RLEA or RLPL. As the expulsion of the plaintiffs occurred in the last period for a default of dues in 1952 and 1953, he felt that the invalidation of the agreement for a misuse of dues occurring subsequent to the expulsion of the plaintiffs would be of no pertinency in this case.

In this I think he erred. The agreement was the constant weapon of the union, throughout, in pressing for the discharge of the plaintiffs, and indeed as late as the spring and early summer of 1957. Not until then were they ousted from their employment. Thus BRT was invoking the agreement against the trainmen both in 1956 and in 1957. If the agreement was avoided, as in contravention of the trainmen's Constitutional rights or of the Corrupt Practices Act, by the union's expenditures in 1956 and 1957, and the union used the agreement in that period to the plaintiffs' hurt, the appellants should be able to recover compensation for the resulting injuries.

I think the plaintiffs were, at least, entitled to a plenary trial on this claim. The District Court has not held that the agreement was or was not vitiated. Finally, that the plaintiffs may have, as the majority opinion intimates, some other remedy than damages on this ground of action is not, in my opinion, an acceptable reason for dismissing the claim.

III. I would allow the proposed amendment which seeks to preserve the trainmen's seniority and return them to the Railroad. Obviously, seniority is the marrow of the union's refusal to consent to the Railroad's restoration of the men in its employment.

The appellants in brief and at the bar asserted that BRT had arbitrarily and vindictively barred their reinstatement to its membership with seniority. It was thus employing the union agreement, they charged, to squeeze them out of their jobs, inasmuch as only one or two unions other than BRT were available to their craft. The argument quite

readily showed that their entitlement to BRT membership without loss of seniority was the issue underlying the prayer of the proposed amendment: that the union be compelled to consent to their reemployment by the Railroad without prejudice.

If, as the opinion of the Court suggests, the trainmen now have the necessary union membership, though in another union, and BRT agrees they may return to B&O's employment as new men, their cause is simplified. The point is that BRT is still using the trainmen's relinquishment of BRT membership, and their entry into UROC, to deprive them of seniority. I think the Act should not be subject to the whim of the union; I think the Act assures them the right of membership in BRT and their former employment undiminished. Otherwise, the statute is utilized to further a selfish aim of the union. Cf. Railway Employe's Dept. v. Hanson, 351 U.S. 225, 238 (1956).

In declining to consent to B&O's acceptance of the plaintiffs with seniority the union violates its obligations as the collective bargaining representative of the trainmen. Its opposition has no base save a determination to punish them for leaving BRT. That the men left in the bona fide belief that they could lawfully change unions is not questioned. That they proved to be mistaken in their understanding of the law — a mistake shared for years by the lower Federal courts — should not bring down upon them crushing penalties — the irretrievable impairment of their livelihood. Notwithstanding, the union has seized upon the error as warrant to use its powers under the union shop agreement and the Railway Labor Act to oppress the trainmen in this very way.

The plaintiffs were never defiant of unionism, the union shop or maintenance of continuous membership. They were never "free riders". They have always been quite willing to pay all back dues. They did prefer another union, and so in good faith they joined the Union of Railroad Operating Crafts. But this was in no wise reprehensible behavior. Indeed, the proviso of the 1951 amendment to the Act explicitly stipulates "that nothing herein or in any such

agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services." This provision, of course, contemplates that the change should cause no disturbance of seniority. UROC was not an outlaw or "splinter" union. The reason it did not qualify under the Act was not that it was not "national in scope, organized in accordance with this Act"; the reason was only that UROC had not qualified as an elector of the union representatives on the National Railroad Adjustment Board. Rychlik v. Pa. R.R. Co., 352 U.S. 480, 485 (1957). Yet the statutory right to change unions is by the Brotherhood subordinated to its own policy.

The bitterly vengeful attitude of the Brotherhood is manifested by its conduct towards the trainmen. On September 3, 1953, within three months after the last withdrawals by the plaintiffs from BRT, the General Chairman of its Grievance Committee rejected an application for reinstatement to the union of a former member because the applicant had joined UROC. This rejection was publicized to all of the plaintiffs as notice of the union's intentions towards them. Not only did the Chairman declare that B&O trainmen having membership solely in UROC were not maintaining requisite union membership, and were not entitled to employment by B&O, but he denounced their separation from BRT as desertion and going "over the hill". He stated that he was "not too much concerned about what" the applicant had to say and depicted him as a supplicant "on bended knees asking for forgiveness".

The plaintiffs had not abused the privilege of transfer from one union to another through undue repetitions. They have done nothing to forfeit their right to rejoin the Railroad unpenalized, if that right is measured upon their good faith, the statute and the agreement, rather than upon the preference of the union. The 1951 amendment discloses a constant solicitude for the employees against an arbitrary exercise by the union of the power vested in it by the

amendment as instrumented by the shop agreement. A strict, constant and delicate sensibility of the bargaining representative to its trust has repeatedly been enjoined upon the union by the Supreme Court. Conley v. Gibson, 355 U.S. 41 (1957). That the factual basis of these cases was race or color does not in the slightest dilute the unequivocal command of fairness they give the bargaining agent.

Equity will relieve the plaintiffs from the injustice and intransigence of the union. It will in the circumstances forbid the union to pursue its objection to the Railroad's unqualified reemployment of the plaintiffs and will award appropriate damages for the union's persistence. In this the court is but enforcing the privilege of the employee under the statute and insisting that the union respect its trust. A bona fide mistake will not be allowed to stand to the prejudice of an honest suitor. A sharper hurt is scarcely imaginable than the destruction, for no wrongdoing whatsoever, of the benefits of a long career of honorable service. Clifton Mfg. Co. v. United States, 76 F. 2d 577, 579-581 (4 Cir. 1935), cert. den. 296 U.S. 622; Winget v. Rockwood, 69 F. 2d 326, 332 (8 Cir. 1934).

Of this dispute the District Court plainly had jurisdiction. It was a fight between employees and union. Again, the union was sued in its detached capacity as their bargaining representative by trainmen not of its body. The Railroad had no place in the action, for it had no quarrel with either party. Conley v. Gibson, 355 U.S. 41 (1957), supra. For these reasons the controversy was not within the province of the National Railroad Adjustment Board.

Nor can I agree with the trial court that those of the appellants known as the Decker suit plaintiffs are precluded in this suit by the National Railroad Adjustment Board's decision on the submission by B&O to NRAB of their discharge. The Board has no power to adjudicate as between those plaintiffs and their bargaining agent. Likewise, Sampsell v. B&O R. Co., 235 F. 2d 569, is mistakenly cited as a sustaining precedent, for it merely held the court to be without original jurisdiction when the contest, as there, was between the railroad and its employees.

The proposed amendment to the complaint was procedurally acceptable; it was in keeping with the original object of the suit. The "presentation of the merits of the action will be subserved thereby". FRCP 15(b). The amendment was simply an expansion of the complaint's first cause of action, and for that reason was not subject to the condemnation of laches. Again, the claim outlined in the amendment is not premised on discrimination in reinstatement into the union—a point expressly waived by the plaintiffs—but on denial of reinstatement with the Railroad with seniority.

Of course, the good faith of the plaintiffs was not significant in their citation initially for discharge by the Railroad, for between the Railroad and its employees the bald status of their unionship was conclusive. Rychlik v. Pa. R.R. Co., 352 U.S. 480, supra; Latham v. B&O R. Co., 274 F. 2d 507 (2 Cir. 1960). But neither of these cases goes beyond that point; they do not consider the issue of restoration with seniority. In Rychlik the Court held UROC an ineligible union, and held nothing more, for nothing else was required for decision. In Latham, no claim was asserted against the union and reemployment and seniority were not in the case. Pp. 509, 510.

The trial on the proposed amendment would not, I think, as the District Court feared, entail complications in the matter of seniority with the other trainmen. As a party to the case a decree for or against the union would bind the other trainmen.

In my opinion the judgment of the District Court should be reversed insofar as it denies the appellants a trial on the claim relating to the validity of the union shop agreement and on the case made by the proposed amendment, but in all other parts it ought to be affirmed.

ON PETITION FOR REHEARING.

(Petition for Rehearing filed March 23, 1961.

Denied September 21, 1961.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and BRYAN, District Judge.

Herbert M. Brune (Meyer Fix on brief) for Appellants, and Bernard M. Savage (Wayland K. Sullivan on brief) for Appellees.

PER CURIAM:

Action upon the appellants' petition for rehearing was deferred, at the petitioners' request, pending a decision by the Supreme Court in *International Association of Machinists v. S. B. Street.* That case has now been decided. 367 U.S. 740 (1961). We find nothing that supports the contentions of our appellants, either in the plurality opinion of Mr. Justice Brennan in which the Chief Justice and Justices Clark and Stewart joined, or in the opinion of Mr. Justice Douglas, concurring hesitantly to make up the necessary majority, or in the separate dissenting opinions of Justices Black and Whittaker, or in the dissent of Mr. Justice Frankfurter in which Mr. Justice Harlan joined.

In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), the Supreme Court had upheld the validity of §2. Eleventh of the Railway Labor Act (45 U.S.C.A. §152, Eleventh) which authorized collective bargaining agreements requiring employees as a condition of continued employment to belong to an authorized union. Justice Brennan's opinion in the *Street* case, answering the contention of the Union that *Hanson* had already disposed

of the First Amendment claims raised by the discharged employees in *Street*, drew a distinction which is highly significant here. Justice Brennan said:

> "* * * But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the cost of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their money for any particular political objective. In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. * * *" 367 U.S. at 747-48.

Recognizing this distinction, we cannot avoid the conclusion that the record in the instant case is like *Hanson* and unlike *Street*, in that we have here the assertion of objectionable political activity made for the first time several years after the suit had been filed and long after termination of the plaintiffs' union membership. We find in the present record nothing to indicate that opposition by the plaintiffs to the union's political activity or the use of plaintiffs' dues for that purpose was ever voiced while they were members. It does not even appear that such expenditures were made in any of the years before the plaintiffs' expulsion for non-payment of dues. The carefully restricted conditions of liability set forth by Mr. Justice Brennan in *Street* can afford no comfort to these plaintiffs. Mr. Justice Douglas makes it plain that he concurs only on condition that relief shall be confined to the protesting members. Our plaintiffs did not show that they ever registered any protest.

Moreover, even if these appellants succeeded in bringing themselves within the narrow scope of the majority's requirements in *Street* to recover a portion of their dues,

it nevertheless plainly appears from the opinions of seven of the nine justices that the plaintiffs would not in any event be entitled to the primary relief sought—a judgment invalidating the collective bargaining agreement as to them.

The majority of the court finds no ground for departing from its previous holding, to which we felt compelled by *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1957), for the reasons previously stated.

The petition for rehearing must be denied.

Judge Bryan abstains from any action on this petition.